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Paper No. 6

In re Application of :  
Linlee Blake Nelson : DECISION ON PETITION  
Application No. 09/894,432 :  
Filed: June 26, 2001 :  
Attorney Docket No. P0113 :

This is a decision on the petition filed by facsimile transmission on December 9, 2003 by which petitioner requests withdrawal of the examiner's holding that this application stands abandoned for failure to file a reply to the Office letter dated July 31, 2002. The petition is being considered under 37 CFR 1.181, and no fee is required.

The petition is dismissed as being untimely filed.

The record shows that a Notice of Abandonment was mailed to the correspondence address of record on March 24, 2003. The instant petition was filed almost nine months later.<sup>1</sup> Pursuant to MPEP § 711.03(c), a petition to withdraw the holding of abandonment that is not filed within two months of the date of a properly addressed Notice of Abandonment will be dismissed as being untimely under 37 CFR 1.181(f) absent a proper terminal disclaimer.

Petitioner may file a renewed petition, without fee. The renewed petition may take the form of a proper terminal disclaimer, the fee therefor, and a request for consideration of the instant petition on its merits. Petitioners are advised that MPEP § 711.03(c) reads in pertinent part:

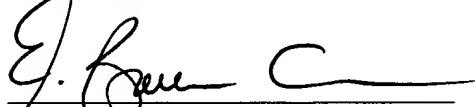
"Rather than dismiss an untimely petition to withdraw the holding of abandonment under 37 CFR § 1.181(f), ... the Office may treat an untimely petition to withdraw the holding of abandonment on its merits in a utility or plant application filed on or after June 8, 1995, on the condition that the petition is accompanied by a terminal disclaimer **dedicating to the public a terminal part of the term of any patent granted thereon that would extend beyond the date 20 years from the filing date of the application, or the earliest application to which the application specifically refers under 35 USC §§ 120, 121, or 365(c).** ... **the terminal disclaimer must also apply to any patent granted on any application that claims the benefit of the filing date of the application under 35 USC §§ 120, 121, or 365(c).** ... Where a petition to withdraw the holding of abandonment is granted, the application is considered to never have been abandoned and, as such, the

<sup>1</sup>The petition was accompanied by a facsimile transmittal letter which states that counsel's records reflect that the petition was filed by facsimile transmission in early October, 2003. However, the petition was not accompanied by evidence supporting this statement. Even if filed in early October, 2003, the petition would have been filed more than six months after the mailing date of the Notice of Abandonment.

prosecution delay caused by the treatment of the application as abandoned is not considered a per se failure to exercise due diligence. Thus a terminal disclaimer is required to avoid granting patent term extension under 35 USC § 154(b) due to prosecution delay caused by the treatment of the application as abandoned." (Emphasis supplied.)

Petitioner is advised that a proper terminal disclaimer includes the language emphasized in the material quoted above. This application is being retained in Technology Center 3700 pending the filing of a renewed petition, or other appropriate action by petitioner.

PETITION DISMISSED.<sup>2</sup>



E. Rollins-Cross, Director  
Technology Center 3700

Burkhart & Burkhart  
Patent Attorneys  
940 Dakota Avenue  
Whitefish, MT 59937

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<sup>2</sup>As a courtesy, petitioner is advised that a cursory review of the petition shows that it appears to be grantable on its merits.